United Nations A/69/277

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights, including ways and means to promote the human rights of migrants

Report of the Secretary-General

Summary

The present report is submitted pursuant to General Assembly resolution 68/179. In that resolution, the Assembly requested the Secretary-General to submit at its sixty-ninth session a report on the implementation of the resolution, including an analysis on ways and means to promote and protect the rights of migrant children, particularly in the case of unaccompanied migrant children and children separated from their families.

Written submissions were received from States, intergovernmental organizations and non-governmental organizations in response to a note verbale from the Office of the United Nations High Commissioner for Human Rights on behalf of the Secretary-General requesting information on the implementation of the resolution.

The report contains an analysis of ways and means to promote and protect the human rights of migrant children, including unaccompanied children or those separated from their families, with a focus on the risks faced by adolescents. The report also addresses the challenges to and recent practices in promoting and protecting the human rights of all migrants at international borders.

* A/69/150.

14-58884 (E) 250814

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I. Introduction

1. In its resolution 68/179, the General Assembly requested the Secretary-General to submit at its sixty-ninth session a report on the implementation of the resolution, including an analysis on ways and means to promote and protect the rights of migrant children, particularly in the case of unaccompanied children and children separated from their families. In paragraph 4 (c) of the resolution, the Assembly also requested States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including at ports and airports and at borders and migration checkpoints, and train public officials working in those facilities and in border areas to treat migrants respectfully and in accordance with the law.

2. In response to a note verbale sent by the Office of the United Nations High Commissioner for Human rights (OHCHR) on behalf of the Secretary-General requesting information on the implementation of resolution 68/179, written submissions were received from States and intergovernmental and non-governmental organizations.[1]

3. The present report focuses on the human rights challenges faced by unaccompanied adolescents and children separated from their families (sect. II). Section III examines the violations and abuses faced by migrants at international borders and examines recent practices aimed at promoting and protecting their human rights. The final part (sect. IV) contains conclusions and recommendations.

II. Promotion and protection of the human rights of migrant children and adolescents

4. It is estimated that there are 35 million international migrants worldwide under the age of 20, and 11 million between the ages of 15 and 19 years.[2] However, the lack of homogeneous criteria among countries for collecting statistics and the difficulty of gathering data on migrant children and adolescents in an irregular situation complicate the ability to assemble a more accurate picture of this dimension of migration. Even when data on migratory populations and flows are available, they are not adequately disaggregated and seldom provide any information on their human rights situation.

5. Migrant children and adolescents, in particular those in an irregular situation, are exposed to grave human rights violations and abuses at various points in their journey.

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[1] The text of most of the submissions received are available from www.ohchr.org/EN/Issues/Migration/Pages/WSReportGA69.aspx.

[2] United Nations and others. "Facts and figures: international migrant children and adolescents (0-19 years)", September 2013. Available from www.un.org/esa/population/migration/documents/Factsheet%20Children%20and%20Adolescent%20Migrants%20090620l3.pdf.

A. Normative framework[3]

6. Under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all human beings are entitled to civil, political, economic, social and cultural rights, without discrimination of any kind, including with regard to their migration status.

7. All human rights treaties contain relevant provisions, but the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are of particular relevance. The Convention on the Rights of the Child protects the rights of "every human being below the age of eighteen years" (art. 1), regardless of their status. It lists a number of rights relevant for migrant children and adolescents, such as registration immediately after birth, family reunification, protection from violence and abuse, access to health and education and rest and leisure, protection from exploitation, prohibition of child labour and protection from sexual abuse. It also establishes four overarching principles: non-discrimination;[4] the best interests of the child; the right to survival and development; and the right of the child to express his or her views and to have them taken into account.

8. Under article 3 (1), the best interests of the child shall be a primary consideration in all actions of State or private institutions concerning children.[5] The Committee on the Rights of the Child, at its day of general discussion on the rights of children in the context of international migration, held on 28 September 2012, recommended that States should make clear that the child's best interests take priority in their legislation, policy and practice, including on migration.[6,7]

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[3] This includes the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities; relevant conventions of the International Labour Organization (ILO); the 1951 Convention relating to the Status of Refugees; the 1954 Convention relating to the Status of Stateless Persons; the 1961 Convention on the Reduction of Statelessness; the United Nations Convention against Transnational Organized Crime; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; the Geneva Conventions of 12 August 1949; the Vienna Convention on Consular Relations; the International Convention for the Safety of Life at Sea; the International Convention on Maritime Search and Rescue; the United Nations Convention on the Law of the Sea; and the Rome Statute of the International Criminal Court.

[4] In Argentina, non-discriminatory treatment is guaranteed by law.

[5] In Egypt, the principle of the best interests of the child is enshrined in the Constitution.

[6] Report of the 2012 day of general discussion on the rights of all children in the context of international migration, para. 73. Available from www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf.

[7] In Mexico, the Immigration Act establishes family unity and the best interests of the child as primary criteria for admission and residence.

9. The Committee on the Rights of the Child, in its general comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, stipulates that States should take all measures necessary to identify the child, carry out tracing activities and appoint a guardian to ensure respect for the child's best interest (paras. 13 and 21).[8] The Committee also recommends that States ensure that the rights enshrined in the Convention are guaranteed for all children under the State's jurisdiction, regardless of their migration status (para. 12).

10. States are also called upon to "conduct individual assessments and evaluations of the best interests of the child at all stages of and decisions on any migration process", "completely cease the detention of children on the basis of their immigration status" and "adopt alternatives to detention".[9]

11. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families prohibits the confiscation or destruction of identity documents and collective expulsions, and underscores the right of migrants to protection and assistance from consular or diplomatic authorities. It also particularly underscores the rights to education and health of migrants, among others.

12. The International Labour Organization conventions relevant to the situation of migrant workers include the Migration for Employment Convention (Revised), 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). Those two conventions establish rules regarding the equality of treatment of migrant workers in a regular situation with the nationals of the State party and the minimum age for employment, apprenticeship and training. Two additional conventions relate to the protection of the rights of children and work: the Minimum Age Convention, 1973 (No. 138), in which States commit themselves to abolishing child labour and raising the minimum age for employment, and the Worst Forms of Child Labour Convention, 1999 (No. 182), under which States parties are called upon to take measures to prohibit and eliminate the worst forms of child labour, including all forms of slavery, trafficking, debt bondage, prostitution and hazardous work.

13. The international human rights framework notwithstanding, migrant children and adolescents are at high risk of human rights violations and abuses. Migration laws, policies and practices often lack a child-rights approach and disregard the principle of the best interests of the child in decisions relating to migration governance policies on detention, deportation, restrictions on access to basic services and family unification.

B. Human rights challenges

1. Age assessments

14. Under national immigration policies, the lack of documents proving the age of child and adolescent migrants may result in an arbitrary determination. In such cases, States often employ such age assessment procedures as physical

[8] In Germany, the Youth Welfare Office appoints a guardian who represents unaccompanied children in all matters relating to residence and asylum. In Mexico, child protection officers are tasked with protecting the integrity and rights of unaccompanied children.

[9] Report of the 2012 day of general discussion, paras. 72, 78 and 79.

examinations, including radiological or other determinations of bone development. However, in addition to being intrusive, such procedures can be inaccurate and therefore inadequate for determining age. Any error in this regard can have a profound impact on the child, depriving her or him of protective measures that are essential for well-being and development.

15. According to the Committee on the Rights of the Child, and reiterated by OHCHR in its study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration (A/HRC/15/29, para. 44), age assessment should be a measure of last resort. If conducted, the assessment should be scientific, safe, fair and child and gender sensitive. It should be carried out by an independent panel of experts or by child protection officials, who "should not only take into account the physical appearance of the individual, but also his or her psychological maturity". Such assessment should avoid any risk of violating the physical integrity of the child and give due respect to the rights to privacy and dignity. In case of any uncertainty, the child should receive the benefit of the doubt[10] and be treated accordingly. The opportunity to appeal against the decision should be ensured.[11]

2. Transition to adulthood

16. The established legal threshold of 18 years of age for the application of the protective measures of the Convention on the Rights of the Child does not fully take into account the reality of the transition from childhood to adulthood. Research shows that the cognitive and socio-emotional development of the adolescent continues well beyond the age of 18.[12]

17. Depriving adolescents of protection when it may still be needed can render them particularly vulnerable to human rights violations, abuse and exploitation and present significant psychosocial and development challenges at a critical stage of their lives.

18. Children and adolescents experience acute anxiety and fear of detention and uncertainty regarding continuing access to basic services and rights such as education and work. The incentive to pursue education or training is greatly reduced owing to the risk of detention or non-eligibility for education, skills training and work upon reaching the age of majority. Living with such uncertainty and fear of the future affects adolescents' enjoyment of rights and well-being, in addition to their ability to contribute to society.

19. Accordingly, the protection provided by the provisions of the Convention on the Rights of the Child should not always automatically be withdrawn when a young person turns 18; adequate follow-up, support and transition measures should be considered.[13,14]

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[10] In Malta, in case of doubt regarding the age of an unaccompanied child, it is the usual practice to give the child the benefit of the doubt.

[11] Committee on the Rights of the Child, general comment No. 6, para. 31 (a).

[12] OHCHR and others, "Human rights of undocumented adolescents and youth", 2013, p. 12. Available from www.globalmigrationgroup.org/sites/default/files/uploads/gmg-topics/mig-data/Human-Rights-of-Undocumented-Adolescents-Youth.pdf.

[13] Report of the 2012 day of general discussion, para. 69.

[14] In Norway, municipalities provide care services until unaccompanied children reach the age of 20 years in order to ensure that those granted residence permits are properly settled.

3. Detention

20. In the context of stringent enforcement of border governance owing to rising criminalization, some countries systematically detain migrants on the grounds of irregular entry or stay within their territory. Children and adolescents in an irregular situation often end up in immigration detention as well, sometimes because of their parents' irregular status.

21. The Convention on the Rights of the Child prescribes that "no child shall be deprived of his or her liberty unlawfully or arbitrarily" (art. 37 (b)). The Committee on the Rights of the Child has recommended that the "detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child ... States should expeditiously and completely cease the detention of children on the basis of their migration status."[15,16]

22. The Committee further recommended that "States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life".[17] Furthermore, the Convention extends to children the right not to be separated from their parents against their will (art. 9 (1)). Some alternatives to detention include release with non-onerous reporting conditions, supervision by non-governmental organizations or referral to shelters. When considering alternatives to detention, authorities should note their impact on the enjoyment of human rights and ensure that they are in line with, among others, the principles of necessity and proportionality. Thus, the individual circumstances of children or adolescents and the impact of these measures on their rights and well-being will need to be assessed.

23. The decision to detain a child or adolescent taken without individual and proper assessment is a matter of serious concern. Administrative and other relevant authorities need to take into consideration appropriate procedural safeguards and due process guarantees.

24. As the Special Rapporteur on the human rights of migrants has noted, research shows that the detention of children and adolescents, even for short periods, can be extremely detrimental to their physical and mental health (A/HRC/20/24, para. 48).[18] Children in immigration detention are often traumatized by the experience and have difficulty understanding why they are being "punished" despite having committed no crime (A/HRC/15/29, para. 51).

25. The conditions of detention, which may include overcrowding, forced separation from family, sharing cells with adults, exposure to sexual abuse and violence and lack of adequate food, have a negative impact, both from a human rights and a developmental perspective. In addition, children in detention are often deprived of access to education, health and play and leisure facilities.

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[15] Report of the 2012 day of general discussion, para. 78.

[16] In Spain, detention of children is prohibited by law. In Estonia, unaccompanied children staying irregularly are not detained, but referred to substitute homes or foster care by the Social Insurance Board.

[17] Report of the 2012 day of general discussion, para. 79.

[18] OHCHR and others, "Human rights of undocumented adolescents and youth", p. 9.

26. Article 37 of the Convention on the Rights of the Child establishes that detention of a child shall be used only as a measure of last resort and for the shortest period of time. Children should be treated with humanity and in a manner that takes into account their age-specific needs. They should be held only under conditions that meet the minimum standards of detention, as set out in human rights law. This includes ensuring a child-friendly environment, separation from adults who are not the child's parents, child protection safeguards and independent monitoring.[19]

4. Access to economic, social and cultural rights

27. All children are entitled to the enjoyment of their economic, social and cultural rights without distinction, including age or migration status. However, some destination countries provide restricted or no access to services, including education, health, housing and decent work. Such a denial of rights may have a negative impact on children's physical and mental health and development in the light of their specific psychosocial needs as a vulnerable group.

28. Even when migrant children and adolescents have access to public services, they may be unable to make use of them in practice, especially when they are in an irregular situation, owing to barriers created by fear of detection and deportation; administrative requirements (birth certificate, identity documents, social security number or proof of address); lack of information about their rights and entitlements; and financial and linguistic obstacles.

29. One of the main barriers faced by migrants in an irregular situation is the fear of deportation if they are reported to immigration authorities while seeking public services. Some States require public officials such as health workers or educators to report migrants in an irregular situation to the relevant authorities. Thus, the absence of firewalls between public services and migration authorities is a vital factor in the denial of basic rights (A/68/292, para. 63).[20]

30. Given that human rights are interconnected and interdependent, the denial of one right has a negative impact upon the enjoyment of others. Even when a migrant child or adolescent has the chance to attend school, the lack of access to health care, adequate food, water, sanitation or adequate housing may effectively result, at best, in only a partial enjoyment of the right to education.

Education

31. Primary education should be free, compulsory and available to all children. States are also urged by the Convention on the Rights of the Child (art. 28) and the International Covenant on Economic, Social and Cultural Rights (art. 13) to make secondary and higher education accessible to all.[21] The right to education should be

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[19] Report of the 2012 day of general discussion, para. 80.

[20] The Republic of Korea has established firewalls between immigration authorities and those providing education, medical treatment and support services to migrants in an irregular situation. Portugal has also established firewalls between educational and health institutions and law enforcement or border authorities.

[21] In Portugal and Cyprus, all children, regardless of immigration status, have free access to public education.

enjoyed by all children, including those with irregular status.[22] Failing to enrol children and adolescent migrants in school will have a life-long impact on their future.

32. The Committee on the Rights of the Child stresses that unaccompanied or separated children, irrespective of status, should have full access to education. They should be registered and assisted to maximize their learning opportunities and should be allowed to enrol in vocational/professional training.[23]

33. In some countries, migrant children or adolescents in an irregular situation do not have access to public schools; in others, they have access only to primary education. Even in countries in which migrant children or adolescents are legally entitled to education, informal barriers, including lack of appropriate documents for enrolment, high financial costs (fees, uniforms and school materials), lack of information about their entitlements or the admission system and lack of language skills, may effectively curtail their enjoyment of the right to education.

34. Other challenges faced by migrant children and adolescents include xenophobia, hate speech, exclusion and racism at school, lack of firewalls between educators and migration authorities and pressure from families to earn an income or take care of siblings and perform household chores.

35. Access to secondary education is often problematic. Even when access is granted, adolescents may be unable to enrol for training or internships because these may be considered work and are therefore barred to migrants, especially if they are in an irregular situation.[24] They may also encounter obstacles in taking official exams for lack of appropriate identification documents.

36. Adolescents over 18 years of age face similar challenges in gaining access to professional training or higher education. In addition to administrative barriers, they face legislative and policy impediments because in many countries higher or tertiary education is allowed only for migrants with a regular status. They also face financial barriers such as higher fees as international students, non-eligibility for financial aid or scholarships and inaccessibility of the formal job market to finance their studies. Financial issues are particularly relevant because, upon reaching the age of majority, a young migrant's entitlement to accommodation, social assistance or other basic services may be withdrawn.

37. The continuous and successive obstacles faced by adolescent migrants and their limited educational and professional prospects (especially for those in an irregular situation) are key factors in their early school dropout rates. This situation is further exacerbated in the case of adolescent girls on account of pervasive gender bias.

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[22] Committee on Economic, Social and Cultural Rights, general comment No. 20, para. 30: "The ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care."

[23] Committee on the Rights of the Child, general comment No. 6, paras. 41-42.

[24] In Spain, undocumented children can engage in internships. In Italy, migrant children can gain access to education and participate in vocational training and gain professional experience. With a view to their individual integration, children in an irregular situation are provided with the opportunity to remain in Italy once they turn 18 for reasons that include study or work.

Health

38. The Convention on the Rights of the Child (art. 24) and the International Covenant on Economic, Social and Cultural Rights (art. 12) entitle migrant children and adolescents to enjoy the highest attainable standard of physical and mental health.[25]

39. Migrant children and adolescents are often exposed to traumatic events in their country of origin before departure, abuse and violence during a perilous journey and precarious living conditions and exploitation in destination countries. Consequently, their physical and mental health may be seriously affected. Mental and psychological health concerns of those in detention include depression, anxiety, post-traumatic stress syndrome and self-harm. There have been several instances of death in detention owing to suicide or lack of health services.[26] The gender dimensions of physical and mental health require special attention because precarious journeys may be marked by sexual abuse, including rape, and other forms of gender-based violence against young girls and boys.

40. It is often difficult for migrant children and adolescents to have full access to health facilities, goods and services. They face legislative, policy and practical barriers, including prohibition of access owing to nationality or migration status, high service and medical costs, lack of firewalls and information about entitlements, language barriers and exclusion from health insurance and social security systems (A/HRC/15/29, para. 63). This view was echoed at an expert consultation on access to medicines as a fundamental component of the right to health (A/HRC/17/43, para. 34). Absence of culturally sensitive services, including female medical personnel, can deny girls and young women their right to health and medical services.

41. In circumstances in which only "emergency" health care is available for free, children and adolescents often wait until their health deteriorates significantly or rely on self-medication, unlicensed medical services or other unsafe channels. Other issues of concern relate to immunization against preventable diseases, care for victims of sexual violence, HIV and AIDS, reproductive health care and specialist care or continuous services.

42. States are obliged to ensure that all children, regardless of their migration status, have the same access to health as children who are citizens.[27] In fact, unaccompanied and separated children may require additional, affirmative care and

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[25] In Portugal, migrant children have the same entitlements to health-care services as national children. In Argentina and Mexico, national legislation gives equal access to health-care services to migrants in an irregular situation. In Morocco, health services are free for all migrants.

[26] Carolyn Hamilton and others, "Administrative detention of children: a global report", discussion paper (University of Essex, UNICEF and Children's Legal Centre, 2011), pp. 95-96. Available from www.unicef.org/protection/Administrative_detention_discussion_paper_April2011.pdf; and OHCHR and others, "Human rights of undocumented adolescents and youth", p. 31.

[27] The Committee on Economic, Social and Cultural Rights, in paragraph 37 of its general comment No. 19, noted that "all persons, irrespective of their ... immigration status, are entitled to primary and emergency medical care". In paragraph 34 of general comment No. 14, the Committee underlined that "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons". See also Committee on the Rights of the Child, general comment No. 6, para. 46.

support services on account of their separation from family members and the loss, trauma, disruption and violence that they have endured.[28]

Adequate housing

43. Migrant children and adolescents in an irregular situation face several challenges with regard to the enjoyment of the right to adequate housing. Factors such as restrictions in access to public housing, forced evictions, limited access to the private market because of penalties for providing accommodation to irregular migrants and the lack of affordable housing push migrants in an irregular situation into insecure and low-quality housing, including run-down shanties where they lack the most basic of services.

44. Thus, migrants with irregular status find themselves in situations of great vulnerability. Some fall prey to unscrupulous landlords who charge exorbitant fees in exchange for unsanitary and overcrowded accommodation. Migrants do not report such abusive practices to the authorities for fear of deportation and eviction. If rendered homeless, they are even more vulnerable to xenophobic attacks and other forms of violence, including sexual violence, which particularly affects girls and female adolescents.

45. In some countries children and adolescents are offered accommodation, but their families are not. This results in forced separation, a condition that effectively contravenes the Convention on the Rights of the Child (art. 9). Adolescents, in particular those unaccompanied or separated from their families, may find themselves homeless when excluded from accommodation upon attaining the age of majority.

46. Those children and adolescents who live and work in factories and sweatshops or work as domestic workers are sometimes confined to the premises of their employers, working long hours with little rest. As the Special Rapporteur on the human rights of migrants has observed, they are also at added risk of physical, psychological and sexual abuse (A/HRC/26/35, para. 55), owing to their isolated workplaces.

Decent work

47. Adolescent migrants are entitled to safe and fair working conditions and to full respect of their labour rights according to the international human rights standards[29] and instruments and the relevant ILO conventions.

48. Migrants, in particular those in an irregular situation, face several challenges to gaining access to the formal labour market because it is highly restricted, especially for those lacking qualifications or unable to comply with legal and

[28] Committee on the Rights of the Child, general comment No. 6, para. 47.

[29] Article 7 of the International Covenant on Economic, Social and Cultural rights recognizes "the right of everyone to the enjoyment of just and favourable conditions of work". The Committee on the Elimination of Racial Discrimination, in paragraph 35 of its general recommendation No. 30, establishes that, "while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights". The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), in article 2, provides that States parties shall undertake to "pursue a national policy designed to promote ... equality of opportunity and treatment in respect of employment and occupation".

contractual arrangements. Even when qualified, migrants face barriers to the recognition of their degrees and professional experience. In practice, very few migrants are able to obtain authorized employment in the formal labour market.

49. However, migrant adolescents in an irregular situation need to support themselves, and often their families, even if the work offers poor and exploitative conditions. They are exposed to abusive practices (including child labour and servitude), discrimination, salaries below the minimum wage, non-payment of wages, confiscation of passports, unfair dismissal and hazardous working conditions. They may also be exposed to physical and sexual abuse and to illicit activities. Their inability to gain access to redress mechanisms for fear of deportation enhances their vulnerability. Many employers exploit these vulnerabilities and feel no obligation to provide safe and fair working conditions.[30] Gender discrimination adds an additional layer of vulnerability.

5. Gender equality

50. Migration can be an empowering experience for girls and adolescents, given that it exposes them to new horizons and possibilities. It can, however, also put them at risk of human rights violations and abuses. They may experience barriers to gaining access to their rights more acutely owing to gender discrimination and prescribed roles. Education of boys is often prioritized over that of girls in migrant communities and sometimes even by destination countries. Girls are also affected by their limited access to health services, especially sexual and reproductive health care.

51. Girls face additional risks owing to their limited access to employment. They often work in sectors that are largely unregulated, such as agriculture, sweatshops, the entertainment and sex industry or domestic work, with poor working conditions and the risk of exploitation and abuse. Migrant female adolescents routinely receive lower salaries than migrant men and native-born women.[31]

52. Adolescent girls are also at particular risk when their migration status depends on their employer or spouse. They may be vulnerable to exploitation and abuse by their employer and to domestic violence by their spouse.[32] They may also fear losing their migration status if the relationship breaks down.

6. Xenophobia

53. Human rights violations and abuses are often linked to discriminatory laws and practices and to attitudes of prejudice and xenophobia. Xenophobia can often manifest as indirect discrimination, whereby laws, policies or practices that appear to be neutral have a disproportionate impact on particular groups.

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[30] In the United Arab Emirates, programmes have been implemented to inform employees of their labour rights and duties and the procedures to follow in case of abuse.

[31] Committee on the Elimination of Discrimination against Women, general recommendation No. 26, para. 15.

[32] In Ireland, migrant victims of domestic violence can retain their residency in cases where the renewal of the immigration permission is dependent on the abuser who may be an employer or a spouse.

54. Attitudes that criminalize migrants and blame them for criminal acts, terrorism and economic hardships lead to hate crimes and encourage further restrictions on their economic, social and cultural rights.

55. Children and adolescents are at particular risk of xenophobia at school,[33] having a negative impact on their education and health, including their mental health.

III. Human rights at international borders

56. International migration, in particular irregular migration, is described by some States as a threat to national security (A/HRC/20/24, para. 8). States therefore give primacy to security concerns and to preventing the arrival of migrants at international borders.[34] The Special Rapporteur on the human rights of migrants has pointed out that this perspective is at odds with a human rights-based approach that sees migrants first and foremost as human beings and as holders of rights rather than as a security threat (A/HRC/23/46, para. 31).

57. Prompted solely by considerations of national security, border governance without human rights safeguards can lead to human rights violations and a breach of international principles such as non-refoulement. Border governance often takes place in an environment that lacks transparency and accountability, contributing in turn to conditions of impunity and to the increased vulnerability of migrants. Some States mistakenly consider border areas as international zones or excised territory (such as airports, land entry points and islands off the coast of the mainland), where they can act as though they were not bound by legal regimes or their human rights obligations.[35]

58. However, zones of exclusion from the rule of law and international human rights obligations at international borders cannot be lawfully sustained. States are bound under international human rights law[36] to apply this framework to all human beings in all areas under their jurisdiction or effective control, including migrants.

59. The Special Rapporteur on the human rights of migrants (A/HRC/20/24, para. 13) and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families[37] have clearly stated that the crossing of a national border in an unauthorized manner or overstaying a permit of stay does not constitute

[33] In Spain, an observatory against racism and xenophobia has been created, with one of its projects focusing on preventing and combating racism and xenophobia in schools.

[34] For the purposes of the present report, the term "international borders" is understood broadly as the politically defined boundaries separating territory or maritime zones between political entities and to the areas where political entities exercise border governance measures in their territory or extraterritorially (such areas include land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and so-called "no-man's land" between border posts, in addition to embassies and consulates).

[35] Background paper prepared by OHCHR, in cooperation with the Global Alliance Against Traffic in Women, for the expert consultation on human rights at international borders, 22 and 23 March 2012, p. 14. Available from www.ohchr.org/EN/Issues/Migration/Pages/OHCHRExpertconsultationExploringGapsinPolicyandPractice.aspx.

[36] For the international legal instruments of relevance to migration and human rights, see footnote 3 above.

[37] General comment No. 2, para. 24.

a crime. Irregular entry and stay is not properly defined as a crime against persons or property, nor against national security. It may in some circumstances constitute an administrative offence, but it does not deprive migrants of their human rights entitlements. The Working Group on Arbitrary Detention has also stated that "immigrants in irregular situations should not be qualified or treated as criminals and be viewed only from the perspective of national security" (A/HRC/10/21, para. 68).

60. Increased border surveillance and securitization, together with a drastic reduction of avenues for legal migration, force migrants to seek alternatives. To enter destination countries, they are often compelled to travel routes using unsafe means of transport and relying on smugglers; sometimes, they fall prey to traffickers. Consequently, they are susceptible to human rights abuses and violations, including exploitation, trafficking, ill-treatment and sexual violence. States have an obligation to prevent, investigate and punish those responsible for these violations, provide protection to the vulnerable and remedies to those harmed.

A. Human rights challenges

61. Thousands of migrants tragically die every year trying to cross international borders.[38] They are variously victims of the use of lethal or excessive force by border authorities, the violence of criminal gangs, push-back or interception operations, forced disappearances, refusal of vessels to rescue them when in distress, extreme conditions of travel (such as crossing deserts on foot) or fatal accidents, including the sinking of vessels.

62. If they do manage to reach an international border, migrants often endure ill-treatment at the hands of border officials, for example by the disproportionate use of force to prevent entry or when carrying out a forced return.[39] Women and children are at particular risk of diverse forms of violence, including sexual violence. The border governance malpractices of States, sometimes under the rubric of migration governance, include arbitrary and systematic detention of migrants, ill-treatment, arbitrary and collective expulsions (including refoulement), lack of due process guarantees or procedural safeguards,[40] discrimination and lack of humanitarian assistance which, in situations of humanitarian distress, have been seen to lead even to loss of life.

63. The systematic and arbitrary detention of migrants in an irregular situation for processing migration formalities is increasingly reported. Reports state that detention of migrants has a detrimental effect on their physical and mental health, and prolonged detention has been found to exacerbate the adverse effects of detention (A/HRC/20/24, para. 48). The harm caused by detention is even greater for some groups, including families, children and victims of trafficking or sexual violence or torture.

[38] Consular officials of El Salvador and Guatemala assist in the search for missing migrants. Some missing migrants have been located and the remains of others identified.

[39] Several countries, including Greece, Ireland, Lebanon and Malta, provide human rights training in the context of border control and migration.

[40] In Italy, the Praesidium project provides legal counselling for migrants, identifies vulnerable groups and monitors reception procedures.

64. The international legal framework establishes that detention should be prescribed by law and necessary, reasonable and proportional (A/HRC/20/24, para. 9). The possibility of regular and timely judicial reviews that afford opportunities for release should be provided. The General Assembly, in its resolution 63/184, called upon all States to adopt, where applicable, alternative measures to detention. The Working Group on Arbitrary Detention has also stated that alternatives to detention of migrants in an irregular situation should be sought whenever possible (A/HRC/10/21, para. 67) and the Committee on the Rights of the Child has recommended that immigration detention of children should cease.[41]

65. Even where detainees under criminal law enjoy human rights guarantees and safeguards, migrants in administrative detention centres are often deprived of them. They have rare or limited access to information on the reasons for their detention, consular assistance,[42,43] family contact, interpretation services, legal advice, individual and appropriate assessment of their cases, possibilities of legal review[44] and access to remedies or independent decision-making bodies. The Working Group on Arbitrary Detention has adopted a list of guarantees for immigrants and asylum seekers in detention (E/CN.4/2000/4, annex II).

66. Conditions of detention in border areas are also of concern. Reports have pointed out shortcomings, including lack of medical care, insufficient and poor-quality food, poor sanitary facilities, overcrowding and lack of separate-sex facilities. Migrants in detention are also victims of ill-treatment, sexual abuse[45] and other violence at the hands of border personnel or other detainees. Lack of monitoring of the conditions of detention, the behaviour of some border personnel and the lack of complaint mechanisms aggravate the plight of migrants in detention.

67. Every migrant is entitled to an individual and proper assessment of her or his circumstances by a competent official, including protection needs and human rights and other considerations, in addition to reasons for entry. However, migrants often endure collective expulsions and forced returns, which are arbitrary and lead to further multiple human rights violations. They violate the right to challenge the decision of expulsion, to have an individual determination of the case, and other procedural safeguards and due process guarantees.[46] The expulsion or forced return of migrants who fear torture or ill-treatment or other human rights violations or of

[41] Report of the 2012 day of general discussion, para. 78.

[42] In contravention of article 36 of the Vienna Convention on Consular Relations.

[43] Guatemala, El Salvador, Honduras, Nicaragua and the Dominican Republic concluded a memorandum of understanding with the objective of establishing a network to provide consular protection in Mexico. This network shares consular protection programmes for migrants during their transit and stay in Mexico.

[44] In Malta, migrants in an irregular situation are provided with a pamphlet informing them of their rights, including the possibility of challenging removal orders and filing an asylum application.

[45] The Special Rapporteur on violence against women, its causes and consequences, stated that "cases of custodial rape and other forms of sexual violence against undocumented immigrant women detained for deportation have been reported" (E/CN.4/2000/68, para. 66) and that "even if they are victimized, however, these undocumented migrants continue to be classified as criminals because of their immigration status and attendant offences which they may have committed" (ibid., para. 44).

[46] Human Rights Committee, general comment No. 15, para. 10.

asylum seekers who fear persecution can also result in a violation of the principle of non-refoulement.[47]

68. Interception practices, where groups of migrants are pushed back to countries of origin or transit, can be arbitrary and lead to human rights violations, including of the principle of non-refoulement.[48] Such practices fail to address the protection needs of migrants, put their lives at further risk and disregard the humanitarian assistance needs of migrants who may have been on perilous journeys[49] for a considerable time.

69. Some destination countries have established return and readmission agreements with countries of origin and transit, with the objective of facilitating the rapid expulsion of migrants in an irregular situation and asylum seekers whose claims have been rejected. Such agreements often do not include human rights guarantees and may lead to situations of serial refoulement, given that they do not include mechanisms to monitor the effectiveness of the protection provided or the human rights guarantees in the countries of return.

70. Some border personnel confiscate migrants' personal property such as identity documents, money and mobile phones without returning them when the migrants are expelled. Without those documents, migrants may be at a greater risk of further detention, be unable to contact relatives or lack the means to begin the return journey.

71. Migrants are also vulnerable to acts of exploitation, kidnapping, extortion, violence and killing by gangs and traffickers. However, they often do not report such abuses to the authorities for fear of reprisals from those individuals or because authorities may be complicit with traffickers. Thus, some border zones are zones of impunity.

B. Principles and guidelines

72. To address these and other human rights violations faced by migrants at international borders and the gaps in the effective enjoyment of their human rights, OHCHR has prepared a set of recommended principles and guidelines on human rights at international borders.[50] Deriving from core international human rights instruments, the principles and guidelines are offered primarily to States to support them in fulfilling their border governance obligations in accordance with international human rights law and other relevant standards. They are also recommended to other relevant stakeholders.

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[47] OHCHR, "Migration and human rights: improving human rights-based governance of international migration", p. 19.

[48] Italy has engaged to abandon "push-back" practices and has strongly committed itself to search and rescue activities at sea through its Mare Nostrum rescue operation, which began following the sinking of a ship off the island of Lampedusa in 2013 in which hundreds of migrants lost their lives.

[49] Colombia has established offices in border areas where, in cooperation with the International Committee of the Red Cross, they provide humanitarian assistance to vulnerable returned migrants. El Salvador has established a reintegration of returned migrants programme to provide assistance in the reintegration of returned girls, boys and adolescents.

[50] The text will shortly be available from www.ohchr.org/EN/Issues/Migration/Pages/WSReportGA69.aspx.

73. The principles establish the primacy of human rights in migration governance, which includes the duty to respect, protect and fulfil human rights wherever jurisdiction or effective control is exercised, including extraterritorially, the right to due process and the principle of the best interests of the child. They also recall that border governance measures must not be discriminatory and the obligation to provide assistance and protection from harm, in particular by respecting the non-refoulement principle, the prohibition of arbitrary and collective expulsions, the need to consider the individual circumstances of migrants and the entitlement to access justice and remedies for the human rights violations or abuses endured.

74. The guidelines stress the need to promote and protect human rights in the context of border governance and to include those rights in national legislation, international agreements and capacity-building activities. They also offer direction on how to implement human rights obligations in the different operations of border governance: rescue and interception, assistance, screening and interviewing, identification and referral, detention, return and removal.

IV. Conclusions and recommendations

A. Conclusions

75. **The international human rights framework designed to provide protection to children and adolescents notwithstanding, migrants, in particular those in an irregular situation, are often victims of human rights violations and abuses at the hands of border and law enforcement officials at international borders. They also face multiple human rights violations from other actors, including smugglers and traffickers, in the course of their perilous journeys.**

76. **They are often detained on account of their irregular status, sometimes in deplorable conditions. Such detentions are a violation of their rights and contravene the principle of the best interests of the child. Detention is seen to have a detrimental impact on the overall health of migrant children and adolescents. These concerns are further aggravated in the context of gender-based discrimination and abuse.**

77. **In several countries, children and adolescents, especially those in a situation of irregular migration, face enormous restrictions, de jure or de facto, on their access to economic, social and cultural rights. Factors that prevent the enjoyment of their rights include discrimination, xenophobia and the absence of firewalls between service providers and immigration authorities. Of particular concern is the abrupt termination of the protective measures contained in the Convention on the Rights of the Child once children reach the age of 18. This is an age when the transition from childhood to adulthood has not been fully achieved and the cognitive and socio-emotional needs that require protection in line with the Convention may not have been fulfilled.**

78. **Destination countries often presumptively view migrants, especially those in an irregular situation, as security threats. Migrants routinely experience discrimination, systematic and arbitrary detention, ill-treatment, dangerous interception practices, unlawful profiling, collective expulsions and forced returns. The circumstances of and reasons for their entry into the country**

(including protection or other human rights imperatives) are often not properly assessed, with little attention given to procedural safeguards and due process guarantees. A growing number of migrants are also victims of grave abuses at the hands of criminal gangs and traffickers. The gender- and age-related dimensions of these abuses are particularly egregious.

B. Recommendations

79. The Secretary-General welcomes the information received from Member States concerning legislation, regulations and policies to strengthen the protection of the human rights of all migrants and, in that regard:

(a) Encourages States to ratify all relevant international human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child;

(b) Underlines that States have an obligation under the core international human rights instruments to protect the human rights of all individuals under their jurisdiction or effective control, regardless of their nationality or legal status;

(c) Reminds States that the principle of the best interests of the child should guide their legislation, policies and practices relating to children, including in the context of migration and regardless of their status. Children should not be detained, and their rights to liberty and family unity should be respected;

(d) Calls upon States to determine the best interests of unaccompanied children by carrying out an individualized, case-by-case, comprehensive assessment of their status and protection needs. The assessment should be carried out in a child-rights-friendly manner by qualified professionals. Subsequently, a competent guardian should be appointed;

(e) Encourages States to implement the recommendations adopted by the Committee on the Rights of the Child at the 2012 day of general discussion on the rights of all children in the context of international migration;

(f) Calls upon States to provide adequate follow-up and support measures for children/adolescents when they reach 18 years of age, especially for those leaving a care context, by ensuring, among other things, access to regularization of their migration status and reasonable opportunities for completing their education and integrating into the labour market;

(g) Encourages States to establish effective safeguards and firewalls between public service providers and immigration enforcement authorities. Public service institutions should not be required to report to or otherwise share data with immigration authorities;

(h) Calls upon States to respect, protect and fulfil the human rights of all migrants, including through their border governance practices. States should consider applying the recommended principles and guidelines on human rights at international borders prepared by the Office of the United Nations High Commissioner for Human Rights;

(i) Calls upon States to combat xenophobia, racism and discrimination against migrants, including on the basis of gender. States should also refrain from criminalizing migrants in an irregular situation because they have committed no criminal act;

(j) Underlines the right of migrants to individual and proper assessment of their circumstances (including protection needs, human rights and gender considerations) with procedural safeguards and due process guarantees;

(k) Encourages States to implement alternatives to administrative detention guided by human rights considerations. Detention should be a measure of last resort and the reasons clearly defined in law. It should be of limited scope and duration, necessary, proportionate and with the possibility of regular and timely judicial reviews that afford opportunities for release. Detention conditions should comply with human rights obligations and be subject to independent monitoring;

(l) Calls upon States to abstain from carrying out collective expulsions or forced returns. Return and readmission agreements should contain human rights guarantees and respect for the principle of non-refoulement;

(m) Calls upon States to prevent, investigate and punish all human rights violations and abuses experienced by migrants during their journey and at borders. Migrants should be provided with effective and timely access to remedies;

(n) Encourages States to expand the opportunities for regular migration, including for low-skilled workers, taking into account the actual labour needs.